

Privy Council Appeal No. 23 of 1912.

Bengal Appeal No. 40 of 1908.

Basar Khan and others - - - - - *Appellants*

v.

Moulvi Syed Leakat Hossein, since deceased, and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 18TH FEBRUARY, 1919.

Present at the Hearing :

VISCOUNT HALDANE.

VISCOUNT CAVE.

LORD PHILLIMORE.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* VISCOUNT CAVE.]

This is an appeal by the defendants from the decree of the High Court of Judicature at Fort William in Bengal, reversing a decree of the District Judge at Bhagalpur, and restoring the decree of the Subordinate Judge of Monghyr, whereby he gave the plaintiff possession of a share in certain property purchased by him under a decree for sale.

The short facts of the case are as follows :—One Kasim Ali, purchased a 15 annas 6 gundas share in property known as Mouza Pahi Khashalpur in Pergunneh Bisthazari Touzi No. 3,036, the purchase being made in the name of his wife, Musammat Aso. There is a question, which will be referred to later, whether the property was intended as a gift to Musammat Aso, or was held by her as *benamidar* (or trustee) for her husband.

Kasim Ali died in 1881 without issue, and leaving as his heirs under the Mahomedan law, two widows, Musammat Aso and

Musamnat Dhupan, a brother, Karamat Khan, and two sisters, Musammats Nanho and Palto, these persons succeeding to his real estate in the following shares :—

Two widows .. 1 anna, 18 gundas, 5 cowries each.

Brother .. 5 annas, 14 gundas, 15 cowries.

Two sisters .. 2 annas, 17 gundas, 7½ cowries each.

In the year 1882, Musammat Aso executed a *mokurari* grant (or grant at a fixed rent) of a 4 annas share of the property in favour of Jaggu Khan, son of Musammat Nanho, and in the year 1883, she executed a similar grant of an 8 annas 6 gundas share in favour of Karamat Khan. There is a question whether Jaggu took as *benamidar* for Karamat, but in the circumstances of the present case this question is immaterial. On the 23rd September, 1884, these two persons, Jaggu and Karamat, mortgaged their *mokurari* interests under the above grants in a 12 annas share of the property to the original plaintiff, Syed Leakat Hossain, to secure a loan advanced to them. There were many subsequent dealings by the heirs with their interests, or alleged interests, in the property ; but the plaintiff was not a party to these dealings, and it is unnecessary to state them in detail. Proceedings for *batwara* (or partition) of the property among the heirs or their representatives have been commenced but are incomplete.

On the 18th April, 1895, the plaintiff instituted a suit (No. 422 of 1895) against the representatives of his mortgagors and other persons interested in the property to enforce his mortgage. This suit was contested, but on the 31st July, 1895, judgment was given in the plaintiff's favour, and it was held that he was mortgagee of a *mokurari* interest in a 12 annas share of the property ; but as a 6 annas 5 gundas share had been alienated by the heirs to a stranger, Mangni Ram, while in the remaining 5 annas 15 gundas share there was no encumbrance, it was ordered that the latter share should be sold first, and if the proceeds should be insufficient for payment of the mortgage debt, the remaining 6 annas and 5 gundas should then be sold. On the 15th January, 1896, the 5 annas 15 gundas *mokurari* share was sold by the Court in pursuance of the decree, and was purchased by the plaintiff himself for a sum which more than covered the amount of his mortgage debt. On the 15th April, 1896, the sale was confirmed by the Court, on the 13th August, 1896, a sale certificate was duly granted to the purchaser, and on the 11th September, 1896, a writ was issued for the delivery to the purchaser of the share sold to him under the decree.

Notwithstanding the formal confirmation of his purchase, the plaintiff was unable to obtain possession of the share sold to him, and on the 10th May, 1904, he instituted the present suit (No. 185 of 1904) against the several persons interested in the property for recovery of possession of the share purchased by him (which he stated to be actually 5 annas, 14 gundas, 15 cowries), and for mesne profits. The Subordinate Judge on the 7th August, 1905, delivered judgment in this suit in favour of the plaintiff, and decreed that the plaintiff should get possession from the defendants

of the *mokurari* share of 5 annas, 14 gundas, 15 cowries, and that the amount of the mesne profits be assessed at the execution stage. The decree proceeded :—

“ In the event of the *batwara* of the mouza in dispute being finally completed, the plaintiff shall have the power to obtain his decreed share in any patti or pattis of the defendants in which the decreed share or any part thereof may fall.”

This judgment, after being reversed by the District Judge, was restored by the High Court, and this appeal is accordingly brought.

The principal point urged on behalf of the appellants is that Musammat Aso, to whom the property was conveyed on the purchase by Kasim Ali, was only a *benamidar* of Kasim Ali, and accordingly was not entitled to make the *mokurari* grants in favour of Jaggu and Karamat in 1882 and 1883. This has been so held in a suit (No. 32 of 1893), in the Court of the Subordinate Judge of Monghyr, who after carefully investigating the facts held that Kasim was the real owner of the property, and that Aso's share was not more than the 1 anna, 18 gundas, 5 cowries, to which she became entitled on the death of her husband ; and this decision was affirmed by the High Court. The present plaintiff was not a party to that suit and accordingly was not bound by the decision ; but in another suit to which he was a party (No. 178 of 1895), the Court adopted the decision in the suit of 1893. It is difficult to reconcile with these decisions the decree in the mortgage suit in which the plaintiff was held to be a mortgagee of a 12 annas *mokurari* share ; but some of the present appellants were not parties to the mortgage suit, and as in the view which their Lordships take of the law the point is not for present purposes material, they assume as against the respondents that Aso was in fact a *benamidar*. If so, it follows that the grants of 1882 and 1883 did not vest in Jaggu and Karamat more than a *mokurari* interest in a 1 anna 18 gundas 5 cowries share, being the share to which Aso succeeded on the death of her husband. But this by no means concludes the case. Karamat, who was one of the mortgagors to the plaintiff, was entitled by succession to a proprietary interest in a 5 annas 14 gundas 15 cowries share. The mortgage doubtless recited the grants of 1882 and 1883, and was made upon the footing that a *mokurari* interest in a 12 annas share had been duly created by these grants ; and it purported to convey a 12 annas *mokurari* share. In these circumstances their Lordships are of opinion that it is not now open to any person claiming under Karamat to dispute that the mortgage effectively conveyed to the plaintiff a *mokurari* interest in at least the 5 annas 14 gundas 15 cowries share to which Karamat was entitled by succession. In the words of the Subordinate Judge “ Karamat's proprietary interest was admittedly a 5 annas 14 gundas 15 cowries share, and therefore the mortgage of a *mokurari* interest held by him to the plaintiff was at best valid to the extent of that share.” This interest by itself, and even without the addition of the proprietary share of Aso (a *mokurari*

interest in which was effectively conveyed by her to the mortgagors) is sufficient to satisfy the plaintiff's claim; and it follows that this claim cannot be disputed by any person claiming under Karamat. It is also to be remembered that all the persons claiming title under Karamat were parties to the mortgage suit, and are bound by the decree for sale, and it is therefore not competent to them to dispute the title of a purchaser under that decree.

The above considerations wholly dispose of the appeal by the first appellant, Basar Khan, who claims under Karamat only. But the other defendants, while claiming partly under grants by heirs of Karamat, also claim interests by purchase from other heirs of Kasim, namely:—Mussumats Dhupan, Nanho and Palto, who were not parties to the mortgage, or bound by the decree of the 31st July, 1895; and they allege that the judgment is wrong in that it gives the plaintiff a right to recover the 5 annas 14 gundas 15 cowries *mokurari* share together with mesne profits, not only from the successors in title of Karamat, but from all the defendants, without regard to the titles under which they respectively claim. If this were the meaning of the decree, it would be open to objection; but their Lordships do not so understand it. The intention of the decree plainly is that the plaintiff shall have possession of a *mokurari* interest in the 5 annas 14 gundas 15 cowries share to which Karamat became entitled in succession to his brother Kasim Ali, and that, if under the proceedings for partition any allotment has been made to any of the defendants in respect of that share, the plaintiff shall be allowed to follow that share into the allotment in question. As regards mesne profits, these are to be assessed in the execution proceedings; and in those proceedings the plaintiff would only be held entitled to the mesne profits of the share recovered by him, and only as against the persons who from time to time have been wrongfully in possession of that share. So interpreted, their Lordships are of opinion that the decree, as made and confirmed by the High Court, gives to the plaintiff no more than his rights, and accordingly that this appeal fails.

The respondents, who lodged a case in the appeal but did not appear before the Board, will have their costs up to and including the date when their case was lodged.

It should be added that the plaintiff has died since the suit was commenced, and his representatives have been substituted as parties on the record; and that a petition filed by one of the appellants alleging an agreement of compromise in his favour was withdrawn during the argument and should be formally dismissed. And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

BASAR KHAN AND OTHERS

o.

MOULVI SYED LEAKAT HOSSEIN, SINCE
DECEASED, AND OTHERS.

[DELIVERED BY VISCOUNT CAVE.]